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has accepted the statement; since that act makes the communication doubly privileged.[23]

It need hardly be said that, since the privilege is a personal one, it may be waived.[24] A few courts, however, seem to have lost sight of this doctrine and hold otherwise. This holding is probably due to the confusion of disqualification with privilege of communication.[25] The latter, of course, may be waived since the term "privilege" itself implies the right of the recipient to decide whether to take advantage of it or not.

The privilege is not terminated by a severance of the marital relation. The objects sought to be obtained in granting the privilege can only be obtained by continuing the protection, in spite of a termination of the marital relation. And in this respect the privilege differs from the common law marital disqualification. The same considerations do not apply, however, to the acts or conduct of the married parties. To extend the privilege to embrace such cases would be going beyond the purpose for which the immunity was designed.[26] Again, the privilege has no application to communications made between husband and wife then living in separation, or to communications between persons living in unlawful cohabitation; because to such cases the policy of the privilege does not apply, since such relations are not those in which the law seeks to foster confidence.[27]

SET-OFF OF BANK'S CLAIM AGAINST DEPOSITOR'S ACCOUNT AS CONSTITUTING A PREFERENCE UNDER § 60 OF THE BANKRUPTCY ACT.—The question of the exercise of the right of set-off by a bank against a bankrupt's deposit is of unusual importance in its practical application to conditions arising in the present commercial world. The Bankruptcy Act, in preserving the right of set-off, has not made provision for all of the many cases that may arise in the exercise of the right, and much controversy has arisen in the application of the Act to some of the cases not specially provided for. However, the question, as presented above, seems to have been worked out by the courts with more or less definite precision by interpreting each section in the light of the purpose it is to accomplish, and by giving an harmonious construction to the whole act.

§ 68a of the Bankruptcy Act specifically provides for the right of set-off: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The application of this subdivision is settled. § 68b limits the scope of § 68a: "A set-off or counterclaim shall not be allowed in favor of any debtor of the

[23] See 4 WIGMORE, EV., § 2340.
[24] Driver *v.* Driver (Ind.), 52 N. E. 401.
[25] Chapman *v.* Holding, 60 Ala. 522.
[26] See French *v.* Ware, 65 Vt. 338, 26 Atl. 1096; 4 WIGMORE, EV., § 2337.
[27] Holtz *v.* Dick, 42 Ohio St. 23.

bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." When is a deposit by a bankrupt such a preference as to preclude the bank from the right of set-off as recognized by § 68a but limited by § 68b? In answering this question we must consider §§ 60 and 57g of the Bankruptcy Act. § 60b covers voidable preferences: "If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before adjudication, the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." § 60a defines a preference as mentioned in § 60b: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before adjudication, * * * made a transfer of any of his property, and the effect of the * * * transfer will be to enable any of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." § 57g is coördinate with § 60b in the proof and allowance of claims: "The claims of creditors who have received preferences voidable under section sixty, subdivision b, * * * shall not be allowed unless such creditors shall surrender such preferences, * * *."[1]

This discussion will be confined to the right of a bank to offset deposits of a bankrupt against a provable debt. The question seems to have given the courts some trouble, especially with reference to two important elements of a voidable preference, namely: (1) That the transfer in order to create a voidable preference must have been voluntary. (2) That there must have been reasonable cause for belief that a preference would be effected such as to charge notice to the bank. The first has reference to the voluntary action on the part of the debtor. It is not essential that there be an intent to prefer, but mere assent or acquiesence is sufficient. The second is a question of the existence of facts sufficient to cause an ordinarily prudent person to believe he is getting an advantage over the other creditors.

As a general proposition, we may say that a bank may offset a note or any indebtedness of the bankrupt against his deposit in

[1] § 1(25) defines a transfer: "Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

the bank, when such deposit is a general deposit subject to check, without any agreement or arrangement for applying it upon the bank's claim.[2] Thus in *New York County National Bank* v. *Massey*,[3] the bankrupt, while insolvent and within the four months period, had deposited large sums of money with the bank in the usual course of business. The bank had honored a check before the deposit was made. Upon adjudication, the bank sought to set off against the deposit notes held by it and prove for the deficit. The question presented was whether the appropriation worked a preference, justifying the refusal to allow proof of the balance under § 57g. The court recognized the right of set-off, holding that the case did not fall within § 68b and that the transfer did not constitute a preference. The case is decisive of the question under discussion, and is the foundation of all subsequent cases. The deposit of money on a general account with a bank creates the relation of debtor and creditor. The bank has a right to deal with its deposits as it sees fit without restriction. There is no fiduciary relation created. The depositor possesses a corresponding right to withdraw his money by issuing checks, which it is the duty of the bank to honor. A transfer by way of deposit is not such a disposition of property as to diminish the bankrupt estate.[4] The debtor does not contemplate a payment of any indebtedness. A payment would create no obligation on the part of the bank to repay, and would effect a depletion of the insolvent fund. In the case of the deposit the bank becomes a debtor, and is obliged to pay the amount upon demand. Then again, the deposit itself does not enable the bank to receive a greater percentage of the debt than any other creditor of the same class, in the sense which creates a preference voidable under the Bankruptcy Act. Though it is true that, if the right of set-off is permitted, the bank will receive a greater percentage of its debt than the other creditors, it is not in contravention of the Act, but is merely the enforcement of a right expressly recognized by it. This result is not brought about directly by the transfer of the property. A contrary ruling, in the case under discussion, would be hazardous, and the consequences far reaching.[5] The appropriation of the de-

[2] This rule applies against the trustee with equal force as against the bankrupt if he had not gone into bankruptcy. And it is immaterial that the debt is not due if owing, though no affirmative judgment can be obtained thereon. Frank *v.* Mercantile National Bank, 182 N. Y. 264, 14 A. B. R. 125; In re Philip Semmer Glass Co., 135 Fed. 77, 14 A. B. R. 25.

[3] 192 U. S. 138 (1904).

[4] Though the payment of money is a transfer of property within the meaning of the Act. See Carson, Pirie et al. *v.* Chicago Title & T. Co., 182 U. S. 438; Jaquith *v.* Alden, 189 U. S. 78; West *v.* Bank of Lahoma, 16 Okla. 508, 86 Pac. 59, 16 A. B. R. 733.

[5] The court in American Bank & Trust Co. *v.* Coppard (C. C. A.), 227 Fed. 597, 35 A. B. R. 742 (1915), following the doctrine of the Massey Case, said, "We deem this conclusion of the Supreme Court salutary and sound. An honest man of business, though embarrassed and possibly insolvent, may not be deprived of the great aid of legiti-

posit neither falls within the exceptions of § 68b, nor does it amount to a preference either before or since the Amendment of 1910.

But a more difficult proposition is presented upon consideration of circumstances wherein the voluntary action of the debtor closely resembles the nature of a payment. In *Studley* v. *Boyslton National Bank*,[6] the Supreme Court extended the rule of the Massey Case by holding that even though the notes of the bankrupt held by the bank were paid by checks drawn on the account, no preference resulted. The depositor was merely doing what would have been done by the law if no check had been given.[7] The case apparently settles the rule that if the right of set-off could be exercised (under the circumstances of the deposit) without the consent of the depositor, his consent does not make it a preference.[8] And it seems that an understanding that a bank deposit shall be applied upon any note or overdraft of the depositor whenever the bank may wish to do so, is not sufficient to take the case out of the rule of the Studley Case.[9] So also, the fact that the bankrupt agreed not to withdraw his funds until after the bank could investigate his financial condition will not supply the voluntary element.[10]

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mate banking. Though in deep water, one is not forbidden to swim to safety if he can." The suggestion has been made that the doctrine of the Massey case will open the door to fraud: "It may readily be seen that the rule of the Massey case is an open door to fraud. If a debtor may continue to deal with his insolvent creditor (there being mutual accounts) and set off debts incurred after notice of insolvency so long as the dealings are in the regular course of business, the purpose of the Act may easily be defeated; and if the reported cases do not yet show any evidence of the use of this shift to gain an advantage over the other creditors, the explanation probably must be that the rule of the Massey case has not penetrated the depths of the commercial world; but the rule needs only to be suggested in a somewhat popular way, and judicial amendment will soon follow." 10 ILL. LAW REV. 602, 609. "The Bankruptcy Act recognizes this right, and it cannot be broken away by construction because of the possibility that it may be abused." Studley *v.* Boylston Bank, 229 U. S. 523.

[6] 229 U. S. 523 (1913).

[7] The time when the right of set-off is to be exercised is not restricted to the adjudication, but it may be valid if otherwise unassailable, at any time within four months before bankruptcy. Putnam *v.* U. S. Trust Co. (Mass.), 36 A. B. R. 658 (1916). The form in which it is accomplished is immaterial. In Lowell *v.* International T. Co., 158 Fed. 781, 19 A. B. R. 853, the court allowed a set-off, after setting aside a trust under which the bank had possession of the funds, thereby creating the relation of debtor and creditor between bank and bankrupt or trustee.

[8] It is well settled as a general proposition that a bank has the right to set off any indebtedness it may hold against the bankrupt against a general deposit standing to his credit. Whether the bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer covering his deposit and applies it as a credit on the indebtedness, or whether it does neither of these things, but appeals to the law to do the same thing in effect, makes no difference as a legal proposition. Wilson *v.* Citizens Trust Co., 233 Fed. 697 (1916).

[9] Tomlinson *v.* Bank of Lexington, 145 Fed. 824, 16 A. B. R. 632.

[10] Germania Savings Bank *v.* Loeb, 188 Fed. 285, 26 A. B. R. 238.

But in all these cases good faith in the transaction is essential.[11] If checks are given or deposits made with the purpose of effecting a preference, then the courts will not allow a set-off, regardless of the circumstances which apparently bring the case within the doctrines of the Massey and Studley cases. Thus, if the bank knew or had reasonable cause to believe that the payment would operate as a preference, then the transaction cannot be upheld.[12] In the Studley Case it was not found that the bank had reasonable cause to believe that the payment of the notes would operate as a preference. It makes no difference that the bank knew of the insolvency when the set-off was applied.[13] The dealings between the bank and the bankrupt were in the usual course of business. The Bankruptcy Act seems to contemplate that the bank, by continuing to do business with the insolvent, will enable the latter to pay his debts. The Act does not seek to interfere with legitimate banking business. There must be a reasonable cause to believe the facts and circumstances with respect to the debtor's financial condition as are brought home to the bank—such facts as would put any ordinarily prudent man on inquiry; and the bank is chargeable with knowledge of such facts as such an inquiry would reasonably be expected to disclose. The test is whether an ordinarily prudent man under the circumstances would have reasonable cause to believe that a preference would be effected, which is a question of fact rather than law.[14] It is not the reasonable cause to suspect, but to believe. In the case of *Mechanics National Bank* v. *Ernst*,[15] the facts showed actual knowledge of the bankrupt's affairs. One of the officers of the bank during business hours went to the bankrupt and demanded additional security for the indebtedness held by the bank, which indicates that the bank considered the circumstances serious. The deposit by the bankrupt was made *after the bank had stopped payment* on the bankrupt's account. The action on the part of the bank was not in the usual course of business, and the court held that the transfer by way of deposit amounted to a preference voidable under § 60b. In this case there was something more than the mere knowledge of insolvency. The bank had reasonable cause to believe that a preference would result from the transaction as carried out. Any ordinarily prudent man would undoubtedly have foreseen the result of such a deposit. In the

[11] Upon a close examination of the cases upholding the doctrines of the Massey and Studley cases one will always find this element present, while in cases apparently contrary to these decisions, good faith on the part of the debtor bank is lacking. See Germania Savings Bank *v.* Loeb. *supra.*

[12] Ridge Avenue Bank *v.* Sundheim, 145 Fed. 798, 16 A. B. R. 863. The Amendment of 1910 changed the "reasonable cause for belief" from belief that a preference was "intended" to a belief that a preference would be "effected."

[13] See cases discussed *post,* note 15. See also, Studley *v.* Boyston Bank, *supra;* Bank *v.* Massey, *supra.*

[14] Putnam *v.* United States Trust Co., *supra;* Ridge Avenue Bank *v.* Sundheim, *supra.*

[15] 231 U. S. 60 (1913).

Studley Case this additional element was not present and the distinction is all important.

The Massey Case and the Studley Case are the two leading cases on the topic under discussion, and the foundation of all the decisions, though there is some dissent among the authorities. The Ernst Case completes the range of the authorities, and is typical of that group of cases, the facts of which present all the elements of a voidable preference.[16]

The discussion gives rise to an interesting case where the depositor is not indebted to the bank except on an overdrawn account. The debtor, while insolvent and within the four months period, deposits in the usual course of business a sufficient sum to cover the overdraft. Upon a subsequent adjudication will the bank be compelled to surrender the amount deposited, as a preference under § 60b? It seems there should be no distinction between this case and those cases discussed above, where the bank held an overdue note. The same reasons apply and the result should not be different.[17]

NATURE OF THE LIABILITY OF INDIVIDUAL PARTNERS FOR PARTNERSHIP TORTS.*—It is a well settled rule in England that upon administration in court of partnership estates and estates of the individual partners, the individual creditors are preferred over

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[16] See 14 MICH. LAW REV. 147, for comparison of Chisholm *v.* First Nat. Bank (Ill.), 109 N. E. 657, 35 A. B. R. 598, and Knoll *v.* Commercial Trust Co. (Pa.), 94 Atl. 750, 35 A. B. R. 379. In the discussion of the Illinois case in 10 ILL. LAW REV. 602, 610, it was said, "The facts of the Studley Case square with the principal case in all essential points except that the bank receiving the checks in the Studley Case did not have reason to believe, etc. This element as we think presents a fatal distinction. The precise point here under discussion was decided a few months earlier than the principal case by the Supreme Court of Pennsylvania with a contrary conclusion in Knoll *v.* Commercial Trust Co., 94 Atl. 750, 35 A. B. R. 379 (Apr., 1915). The Pennsylvania court bases its conclusion on Traders' Bank *v.* Campbell, 81 U. S. (14 Wall.) 87, which arose under the statute of 1867, and finds the rule there stated concordant with the rule of the *Studley* case, the element of knowledge being the decisive factor." In Traders' Bank *v.* Campbell, 81 U. S. (14 Wall.) 87, the transaction presented all the elements of a voidable preference. This case is distinguished in the Massey Case, and followed by In re Starkweather & Albert (D. C.), 206 Fed. 797, where the circumstances showed a deposit with the specific purpose of payment. In addition to the cases cited in the notes above, supporting the principles outlined in the text, see Toof *v.* City National Bank, 206 Fed. 250, 30 A. B. R. 79; National City Bank *v.* Hotchkiss, 231 U. S. 50, 31 A. B. R. 291; Continental & Commercial T. & Sav. Co. *v.* Chicago Title & T. Co., 229 U. S. 435. But see *contra*, In re National Lumber Co., 212 Fed. 928, 32 A. B. R. 388. See Putnam *v.* U. S. Trust Co., *supra;* Wilson *v.* Citizens' Trust Co., *supra.* See also, the discussion of the reasonable cause to believe, in the recent case of German-American State Bank *v.* Larimer (C. C. A.), 235 Fed. 501 (1916).

[17] See Chisholm *v.* First National Bank, *supra;* Tomlinson *v.* Bank of Lexington, *supra.*

*See note, 1 VA. LAW REV. 135.